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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAYNE D. HACK, Plaintiff and Respondent, v. GILBERT & MARLOWE, Defendant and Appellant.	G044080 (Super. Ct. No. 30-2009-00118944) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Priya Navaratnasingham for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

WAIVER

Jayne Hack got a bargain from the law firm of Gilbert & Marlowe in her divorce case. The deal was the law firm would only charge her $150 per hour. In return, however, she had to pay her bills on time and cooperate in any attempt to obtain attorney fees from the opposing side. If not, she would have to pay fees of $350 an hour.

Then came Gilbert & Marlowe's final bill, for about $2,600. Up to then, Hack's boyfriend had been paying the bills. He, however, had passed away about two months before the final bill. Now that Hack was going to pay the bill herself, she looked up her records and concluded Gilbert & Marlowe had overcharged her by billing 58.52 hours for the preparation of 44 subpoenas at 1.33 hours *each*. She balked at paying the final bill. Gilbert & Marlowe rebilled her for their services at $350 an hour. The difference amounted to just over $178,000. Hack didn't pay the new, enlarged bill either, and the dispute escalated into this action – Hack suing first for overbilling and Gilbert & Marlowe cross-complaining for unpaid fees. At the end of the day Gilbert & Marlowe did not obtain the extra $178,000 they claimed. In fact, they now owed Hack, net, another $400.

In response, Gilbert & Marlowe have filed this appeal. Their opening brief, however, substantially violates numerous California Rules of Court, chief of which is rule 8.204(a)(1)(B),[1] which requires that each point be stated under a separate heading or subheading summarizing the point, and further requires each point be supported by argument and, if possible, citation to authority. The purpose for this rule has been explained in *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, footnote 4: "The purpose of requiring headings and coherent arguments in appellate briefs is to 'lighten the labors of the appellate [courts] by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty

[1] All further references to rules or rules of court are to the California Rules of Court.

devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass.' [Citation.]"

The opening brief's failure to present any of its points in the form of coherent headings or subheadings waives those points. (*Conservatorship of Hume* (2006) 139 Cal.App.4th 393, 395, fn. 2; *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345 fn. 17; *Opdyk v. California Horse Racing Bd., supra,* 34 Cal.App.4th 1826, 1830-1831, fn. 4.) Our conclusion of waiver is a corollary of the basic principle of appellate procedure that it is an appellant's burden to demonstrate the existence of reversible error (see *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 626), a burden that is not carried when an opening brief does not properly identify the reasons for any such claimed reversible error.

The opening brief also fails to abide by rule 8.204(a)(1)(C), which requires each brief to support any reference to a matter in the record with a citation to the record. While appellant's brief does contain sporadic references to the record, many statements that should have been supported by reference to the record are not so supported. Points made without record references may be treated as waived. (E.g., *M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1533; *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

Finally, Gilbert & Marlowe have furnished a conspicuously incomplete record for review on appeal. The reporter's transcript begins in medias res with the testimony of one of Gilbert & Marlowe's principals, Richard Gilbert, which was given the day after Hack testified, and thus leaves out the testimony of Jayne Hack in her case-in-chief. Further, none of the exhibits entered into evidence at trial have been transmitted to this court. Given the incompleteness of the record, we are required to assume that substantial evidence, found in what was omitted from the reporter's transcript or

otherwise might be in the exhibits, supported the jury's decision. (*Addam v. Superior Court* (2004) 116 Cal.App.4th 368; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.)

EVEN IF NO WAIVER, NO ERROR SHOWN

However, even if we look at the merits of Gilbert & Marlowe's various contentions – and that within the confines of an appeal without a sufficient record – no error appears. Preliminary, however, we must set forth those facts which may be extracted from the incomplete record provided this court.

A. *Background Facts*

Gilbert & Marlowe was the fourth law firm to represent Jayne Hack in an ongoing marriage dissolution and custody proceeding. In April 2006, she and her boyfriend, Michael Hamrock, came to Gilbert & Marlowe to discuss Ms. Hack's case. Hack signed, with Hamrock acting as a guarantor, a retainer agreement providing that Hack was to be billed at a discounted hourly rate of $150 per hour, down from Gilbert & Marlowe's usual $350 per hour, subject to two conditions: (1) all payments were to be made on time, and (2) Hack was to cooperate with attorneys at all times to seek a court order requiring the opposing party to pay the fees that Hack was not paying.

Hack authorized her boyfriend Hamrock to work directly with Gilbert & Marlowe on her case and to make decisions regarding her representation. In fact, Hamrock was more involved in her case than she was. Hamrock paid all the bills – at least until he died in February 2008.

Part of Gilbert & Marlowe's work involved the valuation of her husband's business. During discovery, Gilbert & Marlowe sent subpoenas to some 44 individuals or entities thought to be customers of that business. Gilbert & Marlowe billed 1.33 hours for each of those 44 subpoenas. They would later contend that they came to an agreement with Hack's boyfriend to pay a flat fee for the subpoenas, given difficulties in preparing them such as obtaining correct addresses.

In February 2008, Mr. Hamrock passed away. By the end of March 2008, Hamrock had paid Gilbert & Marlowe $71,636.84 for their services.

In April 2008, Hack received Gilbert & Marlowe's final bill for $2,613.67. The bill prompted Hack to review past bills. Hack was not pleased. She felt that being charged 1.33 hours each for the preparation of 44 individual subpoenas –many of which may not have actually been issued – was improper. The bill wasn't paid, and, after numerous requests, Gilbert & Marlowe informed Hack that, in their opinion, she had breached the retainer agreement and rebilled her at the rate of $350 per hour. The amount came to $178,594.

In June 2008, Gilbert & Marlowe mailed Hack a notice informing her she could arbitrate their fee dispute with the Orange County State Bar Association. Ms. Hack filed a petition to arbitrate the fee dispute, but then she withdrew her petition, opting rather, in February 2009, to file this action for racketeering, constructive fraud, and negligence against Gilbert & Marlowe. In April 2009 Gilbert & Marlowe cross-complained for breach of contract.

The jury found Gilbert & Marlowe had knowingly and deliberately overcharged for the bills. But then again, the jury also found that the firm had not acted with fraud, oppression or malice. Correspondingly, the jury found that Hack had breached the retainer agreement, but had not deliberately induced Gilbert & Marlowe to enter into the agreement by concealing relevant information about her finances.

The ultimate result was practically a draw. The jury awarded damages of $6,468.25 to Hack and damages of $6,068.56 to Gilbert & Marlowe, resulting in a net win to Hack of just under $400.[2] The trial judge struck a provision in the proposed judgment giving Hack her costs.

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[2] The judgment provides for an award of $399.69 to Hack.

The notice of appeal from the judgment was timely filed. Gilbert & Marlowe appear to make three arguments in favor of reversal.

B. *Jury Instruction*

First, Gilbert & Marlowe assert a jury instruction was error. There was an instruction to the jury that Gilbert & Marlowe should not be given "more in damages" than the firm "would have got if the retainer agreement had not been breached."[3] Gilbert & Marlowe's theory is that the trial judge was arbitrarily limiting their recovery for unpaid hours to $150 an hour, when the recovery for unpaid hours should have been calculated at $350 an hour.[4]

The record shows the trial judge read the proposed instruction (which he wrote himself) to counsel before giving it to the jury. Gilbert & Marlowe's trial counsel brought the last sentence of the instruction to the judge's attention, but only by reciting the sentence.[5] A few moments later counsel alluded to the distinction in rates provided for by the retainer agreement.[6] A little later than that, when the topic of the jury

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[3] The entire instruction was: "In deciding Gilbert & Marlowe's damages, if any, for Ms. Hack's breach of the retainer agreement of April 17, 2006, you must determine the amount which compensates it for all detriment proximately caused by her breach or which would have been reasonably foreseen by the parties as the probable result of the breach in the ordinary course of business. Such damages must also be reasonably certain and clearly ascertainable in both their nature and origin. Do not award Gilbert & Marlowe more in damages than it would have got if the retainer agreement had not been breached."

[4] According to the opening brief, the jury's award of $6,068.56 shows the jury awarded Gilbert & Marlowe 40.56 hours at $150 an hour, when the correct figure (40.56 hours times $350) would have yielded the firm a recovery of $14,196.

[5] Here is the relevant part of the transcript:

"[Gilbert & Marlowe's counsel]: "Your Honor, as for clarification as to instruction – it doesn't have a heading, but it's on page 12.

"The court: We're going to go back on these later on, but let's see if I can find it.

"[Gilbert & Marlowe's counsel]: Yes, your Honor. It's the one based on Civil Code 3300 et sec – the last sentence.

"The court: Yes.

"[Gilbert & Marlowe's counsel]: 'Do not award Gilbert & Marlowe more in damages than it would have got if the retainer agreement had not been breached.'

"The court: Straight out 3353."

[6] Here is the rest of the colloquy after the trial judge's "Straight out 3353" comment:

"[Gilbert & Marlowe's counsel]: Right. Does that – does that indicate that the jury – if they follow this instruction correctly –

"The court: For a breach of contract, you can't get more money than if the contract hadn't been breached.

instruction came up again, counsel made a formal objection on the ground the instruction was misleading. The judge understood the nature of the objection, but made no change in the instruction, and Gilbert & Marlowe have cited us to nothing in the record (and we have not found it on our own) showing that its trial counsel proposed any amplified or explanatory language.[7]

The jury instruction argument fails because the phrase in the instruction to which Gilbert & Marlowe objected – "damages than it would have got if the retainer agreement had not been breached" – was ambiguous. It could have meant: "If you believe Gilbert & Marlowe that Hack breached the retainer agreement, under no circumstances should you award damages at a rate higher than $350 an hour, which is the

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[7] Here is that colloquy:

"[Gilbert & Marlowe's counsel]: Expectation damages?

"The court: No; contract damages.

"[Gilbert & Marlowe's counsel]: Because there are two rates here: 150 an hour and 350 an hour.

"The court: I know.

"[Gilbert & Marlowe's counsel]: Okay. Thank you, your Honor."

"The court: Okay. The next one is the one based on the Civil Code section 3300, starting with the words 'In deciding Gilbert & Marlowe's damages.'

"Any remarks about that?

"Mr. Plummber?

[Hack's counsel]: No.

"The court: Mr. Chavarela?

[Gilbert & Marlowe's counsel]: I don't know whether my previous objection was on the record, your Honor; if not, I'd like to preserve it.

"The court: The objection was what?

"[Gilbert & Marlowe's counsel]: To the last –

"The court: What was the objection? State the objection.

"[Gilbert & Marlowe's counsel]: My – the legal grounds? My objection, your Honor, is to the last sentence of –

"The court: Do you think that you can get – the last sentence says 'Do not award Gilbert & Marlowe more in damages than it would have got if the retainer agreement had not been breached.'

"[Gilbert & Marlowe's counsel]: Yes, your Honor.

"The court: You find that objectionable?

"[Gilbert & Marlowe's counsel]: As it applies to this retainer agreement, yes.

"The court: That's because you think that the retainer agreement was at a discount rate and the regular rate was triggered by virtue of the facts adduced in this trial?

"[Gilbert & Marlowe's counsel]: Yes, your Honor.

"The court: All right. I'm not going to make a change based on that. You can make remarks in your closing argument, if you feel that that's lucid.

"[Gilbert & Marlowe's counsel]: May I simply state, your Honor, my opinion is it misleads the jury?

"The court: Going to the next one . . . ."

most the retainer agreement provides for." Or it could have meant: "If you find that Hack breached the agreement, you should award damages at the rate of $150, since $150 an hour is the rate she would pay if the retainer agreement had not been breached."

Obviously the former makes a lot more sense, and does not misstate the law. The latter contradicts itself. We presume the jury was paying attention and would not have interpreted the instruction in the latter, nonsensical way. (See *People v. Coddington* (2000) 23 Cal.4th 529, 594 ["We credit jurors with intelligence and common sense . . . and do not assume that these virtues will abandon them when presented with a court's instructions."].)[8]

Moreover, in any event, to the degree the instruction needed amplification or further explication to insure the jury understood the instruction in the first sense, it was incumbent on Gilbert & Marlowe to propose an amplification of the instruction. (See *People v. Souza* (2012) 54 Cal.4th 90, 120 ["Defendant did not object to or request amplification of the instructions provided and accordingly his claim that they were inadequate and misleading is forfeited on appeal."]; *People v. Loza* (2012) 207 Cal.App.4th 332, 350 ["Given that the instruction was generally accurate, but potentially incomplete . . . it was incumbent on Jeanne to request a modification if she thought that the general instruction would be misleading under the circumstances of this case."]; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118 ["Because the instruction as given was generally accurate, but potentially incomplete in certain cases, it was incumbent on Brousseau to request a modification if she thought it was misleading on the facts of this case."].)

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[8] *Coddington* was overruled on an unrelated point involving the vicinage clause of the Sixth Amendment in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, footnote 13.

C. *The 44 Subpoenas*

Next, on pages six through nine of the opening brief, Gilbert & Marlowe appear to be indicating that there was no substantial evidence to support Hack's constructive fraud claims. But the argument is so desultory that it is impossible to summarize. So we will not try, except to say that it appears to have something to do with Hack's claim concerning being overbilled for the 44 subpoenas.

We will merely note that if Gilbert & Marlowe's point is that evidence was improperly admitted, no record references showing an objection are given. And if Gilbert & Marlowe's point is they should have prevailed on the issue of the 44 subpoenas as a matter of law on the theory that Hack's late boyfriend agreed to a flat fee for their preparation, then the failure to provide a complete record or any record references precludes the need for further discussion.

D. *Standing*

The final argument is that Hack herself is not entitled to a recovery, only the estate of her late boyfriend, since Hack herself never actually paid Gilbert & Marlowe anything. The argument fails for two reasons. First, the opening brief gives no indication the point was raised in the trial court. Second, under the retainer agreement, Hack was clearly obligated to pay all fees, even if those fees were also guaranteed by her boyfriend, a fact attested to, if by nothing else, by Gilbert & Marlowe's own cross-complaint.

DISPOSITION

The judgment is affirmed. Because Hack did not file a respondent's brief the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.